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No. 02-819

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

ANDREW J. KONTRICK,

Petitioner,

v.

ROBERT A. RYAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

Petitioner Andrew Kontrick replies to the respondent Robert Ryan's brief in opposition.

INTRODUCTION

Respondent does not contend that there are fact issues here or that this case involves anything other than a pure question of law—whether the deadline for objecting to a bankruptcy discharge is jurisdictional. He also does not dispute that the issue is ripe and that if Rule 4004 is jurisdictional, then the decision of the court below must be reversed. Instead, respondent gives three reasons to deny the petition. None of them are convincing.

First, he argues that the case law involving what has been described as the "virtually identical" Rule 4007 may be disregarded because that rule is somehow different from Rule 4004. Yet after making that claim, he fails to show any difference between the two rules. Moreover, the Seventh Circuit below and other courts readily treat the Rules 4004 and 4007 as one and the same for the purpose of deciding the jurisdictional issue.

Respondent next contends that two decisions from the Fifth and Eleventh Circuit—which he acknowledges follow the jurisdictional view—have become "aberrations" and "historical footnotes." However, courts in the majority see it quite differently. These so-called "footnotes" continue to have a substantial following—even in the most recent decisions. Respondent also attempts to place decisions from the Sixth, Eighth, Ninth and Tenth Circuits in the non-jurisdictional camp. Yet, this is an attempt to hammer square pegs into round holes. As courts have already recognized, these decisions do not belong to the non-

jurisdictional line, but to a separate category of cases that permits a narrow equitable exception to deadlines under "unique" or "extraordinary circumstances"—such as when the court itself sets the wrong date. Thus, respondent fails to show that the division between the circuits has disappeared. The split between the circuits is real and continues to fuel the division among the district and bankruptcy courts.

Respondent's final reason to deny the petition is that the Seventh Circuit correctly decided the issue. In making this argument, respondent ignores the very analysis that courts have relied on to find that the deadlines are jurisdictional—this Court's decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). In *Taylor*, this Court rejected the policy arguments for an equitable exception to Rule 4003, in favor of a strict application of the time limits set by that rule. In sum, respondent presents no sound reason to deny the petition. This case presents the Court with a deep and continuing division of authority among courts at all levels that has created widespread confusion in an area that is fundamental to bankruptcy law. This Court in its supervisory role over federal rules should intervene to end that confusion.

ARGUMENT

A. Rules 4004 and 4007 Are Virtually Identical—Indeed the Seventh Circuit Itself Treated Them As One and the Same Here

Respondent's first argument to deny the petition is that Rule 4007 should be considered separately from Rule 4004. Resp. Br. at 5-7. Yet having made such a claim, respondent does not even attempt to show that there is any real difference between the two rules for the purpose of the jurisdictional issue. In fact, as courts have recognized, the rules are "almost identical." Both

rules contain the identical language that an objection to a general discharge (Rule 4004(a)) and discharge of a particular debt (Rule 4007(c)) "shall be filed no later than 60 days after the first date set for the meeting of creditors." Both rules also use the same language that any motion to enlarge the time must be "filed before the time has expired." *See* Rules 4004(b) and 4007(c). Both rules are also part of a limited number of rules (along with Rule 4003) listed in Rule 9006(b)(3) that may be enlarged "only to the extent and under the conditions stated in those rules."

As such, the two rules are interchangeable for the purpose of deciding the jurisdictional issue and courts readily treat them that way. The Seventh Circuit itself recognized this: "[b]ecause the rules are almost identical, it is appropriate to consider decisions by courts construing Rule 4007(c) as well as Rule 4004(a)." App. at 8, n. 3. *See also In re Ginn*, 179 B.R. 349, 352 (Bankr. S.D. Ga. 1995) (court finds that Rules 4004 and 4007 are "virtually identical" and therefore the statement in *In re Coggin*, 30 F. 3d 1443, 1450 (11th Cir. 1994) that Rule 4004 is "jurisdictional" applies equally to Rule 4007); *In re Santos*, 112, B.R. 1001, 1004, n.2 (BAP 9th Cir. 1990) ("Because the time limit provisions of these two rules are identical, the cases applicable to Rule 4007(c) are applicable to interpreting Rule 4004(a) and (b).") Even the cases respondent cites later in his brief to support the non-jurisdictional view treat Rules 4004 and 4007 the same. *See, e.g. Farouki v. Emirates Bank International, Ltd.*, 14 F.3d 244 (4th Cir. 1994) (court analyses whether Rule 4004 is jurisdictional). Thus, the two rules are functional equivalents for the purpose of the jurisdictional issue. To decide the jurisdictional question for Rule 4004 is to also decide the question for Rule 4007. Respondent offers nothing to contradict that basic fact.

B. The Split Between the Circuits Is Real: the Fifth, Tenth and Eleventh Circuits Adhere to the Jurisdictional View and the Second, Fourth and Seventh Circuits Do Not

Respondent's second argument to deny the petition is that the split between the circuits—which he acknowledges exists with the decisions in *Neeley v. Murchisen*, 815 F.2d 345 (5th Cir. 1987) and *In re Alton*, 837 F.2d 457 (11th Cir. 1988)—has evaporated in recent years and the circuits are no longer divided over this issue. Resp. Br. at 7-8. This argument ignores the reality of what judges themselves have said—even in the most recent decisions. The conflict of authority continues at all levels, including the courts of appeal, with a number of courts pointing out that the "majority" follows the jurisdictional view. *See* Petition at 8-9. That division, if anything, is growing and will persist until it is resolved by this Court.

1. The Decisions in *Neeley* and *Alton* Are Anything But "Aberrations" and "Historical Footnotes"

Respondent attempts to support his argument that the split between the circuits no longer exists by claiming that the *Neeley* and *Alton* decisions have become "aberrations" and "historical footnotes." Resp. Br. at 8. Yet the courts in the majority disagree and have relied on *Neeley* and *Alton* continually. Most recently, in *In re Rowland*, 275 B.R. 209, 213 (Bankr. E.D. Pa. 2002), the court identified three courts of appeal as following the jurisdictional line by citing *Neeley* and *Alton*, and also the Tenth Circuit's decision in *First National Bank v. Barnes*, 1992 WL 33251 * 1 (10th Cir. 1992). And, far from being "aberrations," the courts in the Fifth and Eleventh Circuits continue to rely on *Neeley* and *Alton* to support the jurisdictional view. *See In re Tucker*, 263 B.R. 632, 637 (Bankr. M.D. Fla. 2001)

("[a]bsent extraordinary circumstances, the provisions of Rule 4007(c) are jurisdictional and non-waivable," citing *Neeley* and *Alton*); *In re Thomas*, 203 B.R. 64, 70 (Bankr. E.D. Tex. 1996) (relies on *Neeley* to support the jurisdictional view); *In re Ginn*, 179 B.R. 349, 351 (Bankr. S.D. Ga. 1995) (relies on *Alton* to hold that Rule 4007 is jurisdictional).

Courts from other circuits also continue to rely on *Neeley* and *Alton* for the jurisdictional view. In fact, the Tenth Circuit itself did so in *Barnes*, 1992 WL 33251 at *1. *See also In re Glover*, 212 B.R. 860, 862 n.1 (Bankr. S.D. Ohio 1997) (court relies on *Neeley* and *Alton* to support its holding that the rule is jurisdictional); *In re Ham*, 174 B.R. 104, 107, n. 4 (Bankr. S.D. Ill. 1994) (court cites *Alton* and *Neeley* for "majority" view). Thus, respondent's attempt to portray *Neeley* and *Alton* as "aberrations" and "historical footnotes" is flatly contradicted by a substantial line of authority that continues to rely on these decisions.

2. Decisions From the Sixth, Eighth, Ninth and Tenth Circuits Are Not In the Non-Jurisdictional Camp—They Are Limited to the "Extraordinary Circumstances" Exception

Respondent next contends that decisions from the Sixth (*In re Isaacman*, 26 F.3d 629 (6th Cir. 1994)), Eighth (*In re Moss*, 289 F.2d 540 (8th Cir. 2002), Ninth (*In re Anwiler*, 958 F.2d 925 (9th Cir. 1992) and *In re Kennerley*, 995 F.2d 145 (9th Cir. 1993)) and Tenth Circuits (*In re Themy*, 6 F.3d 688 (10th Cir. 1993)) have brought these circuits into the non-jurisdictional camp. Resp. Br. at 7. Here again, the courts themselves have expressly rejected this notion. To begin with, respondent's argument is contradicted by the court below—which recognized only the Second and Fourth Circuits as belonging to the non-jurisdictional line. App. at 14.

("we join our colleagues in the Second and Fourth Circuits in holding that the timeliness provisions here are not jurisdictional.").

The decisions that respondent claims are part of the non-jurisdictional line actually belong to a group of cases that are construed narrowly to allow equitable exceptions only under what has been referred to as "unique" or "extraordinary circumstances"—typically when the court itself sets the wrong deadline. Such decisions simply do not reach the jurisdictional issue. The Second Circuit made this plain in *In re Benedict*, 90 F.3d 50, 54 (2d Cir. 1996) (a true non-jurisdictional decision) when it stated that decisions allowing equitable extensions when the court misleads a creditor do so "without reaching the question of whether the time period imposed by Rule 4007(c) is jurisdictional," [citing *Themy*, *Kennerley* and *Anwiler*].

Recently, in *Rowland* the court made the same point:

> The majority of appellate courts most certainly have **not** held that waiver, estoppel, and equitable tolling apply to Rule 4007(c). [An earlier case] improperly groups *Themy* and *Kennerly* with *Benedict*, but the first two cases allowed the extension on the narrow grounds that the clerk had erred. *Benedict* even recognized this. 90 F.3d at 54. Furthermore, there is no mention of the contrary cases from the Fifth (*Neeley*), Tenth (*Barnes*) and Eleventh (*Alton*) Circuits cited above.

275 B.R. at 214, n. 2. (emphasis in original)

Again, in *In re Leet*, 275 B.R. 695, 699 (BAP 6th Cir. 2002) the appellate panel followed the same analysis to hold that the Sixth Circuit's decision in *Isaacman* could not be placed with the non-jurisdictional decisions: "*Isaacman* has been read narrowly by the courts of this circuit . . . . This exception has been very narrowly applied, and only in situations where the court itself made an error that resulted in the untimely action of a creditor'." [quoting, *In re Gorrell*, 260 B.R. 848, 851 (Bankr. S.D. Ohio 2001)]. Therefore, the respondent's argument that the Sixth Circuit has joined the ranks of the non-jurisdictional line has been soundly rejected by its own bankruptcy appellate panel. The respondent's attempt to place the Eighth, Ninth and Tenth Circuits with the non-jurisdictional cases should be rejected for the same reasons. In fact, the Eighth Circuit's recent decision in *In re Moss*, 289 F.3d 540, 542 (8th Cir. 2002) states that the authority to extend the time arose from the "court's own error" and cites *Issacman*, *Themy* and *Anwiler*.

In sum, respondent's second argument for denying the petition—that there is no longer a split in the circuits—is completely at odds with what the courts themselves have said in their continuing reliance on *Neeley* and *Alton* and their firm rejection of the idea that the "extraordinary circumstances" cases may be considered part of the non-jurisdictional line. As such, the split between the Fifth, Tenth and Eleventh Circuits which follow the jurisdictional view and the Second, Fourth and Seventh Circuits which do not—remains substantial and continues to manifest itself in the ongoing division in the district and bankruptcy courts.

C. The Continuing Division Among the District and Bankruptcy Courts Cannot Be Ignored

Respondent dismisses and does not even discuss the continuing division among the district and bankruptcy courts. Resp. Br. at 9. While a division among the circuits is a principal reason to grant review, the nature and extent of conflict among other lower courts is certainly relevant. Even the most recent decisions

recognize that the division among courts at all levels is very real—with the majority siding with the jurisdictional view. This conflict has created significant confusion in a fundamental area of bankruptcy law. And unless this Court intervenes, that confusion will continue.

D. Respondent Ignores This Court's Analysis in *Taylor v. Freeland & Kronz*—Which Courts in the Majority Follow

Respondent's final reason to deny the petition is that the Seventh Circuit correctly decided this issue. Resp. Br. at 9-11. Yet time and again, courts have relied upon this Court's analysis of Rule 4003 in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) to support their conclusion that the deadline for objecting to discharge is jurisdictional. *See* Petition at 13. However, respondent fails to even mention *Taylor*. Instead, respondent argues that the "text" of Rule 4004 does not "suggest" that it is jurisdictional. Resp. Br. at 10. However, such an argument runs directly contrary to the reasoning in *Taylor*. In *Taylor*, the Court considered the text of Rule 4003 for objecting to exemptions—30 days after the meeting of creditors—which parallels the deadlines set by Rules 4004 and 4007. And in *Taylor*, there was nothing in the text of Rule 4003 that allowed for an equitable exception to the deadline set by that rule. *See also In re Laurain*, 113 F.3d 595, 597 (6th Cir. 1997) (after considering the "unambiguous" language of Rule 4003, court holds that it is "jurisdictional").

Respondent also argues that because the bankruptcy court may extend the deadline, this indicates that it is not jurisdictional. Resp. Br. at 10. Here again, this argument cannot be squared with *Taylor*. In *Taylor*, this Court explicitly noted that the creditor "could have asked the Bankruptcy Court for an extension of time to object." 503 U.S. at 644. Yet after noting that an extension of time was permissible under Rule 4003, this Court did not open the door to equitable exceptions to the deadline.

Finally, respondent argues that the Seventh Circuit correctly determined that a policy of post-judgment "finality" would be better served if the deadline was not jurisdictional. Resp. Br. at 11. However, *Taylor*, expressly rejected a policy argument that equitable exceptions should be allowed to guard against exemptions claimed in bad faith. 503 U.S. at 643-45. *Cf.* (dissent, Stevens, J.), *id.* at 649 (arguing in favor of an equitable exception based on policy concerns). The "finality" endorsed in *Taylor* arose from a strict application of the time limit in Rule 4003: "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Id.* at 644. In short, each of the reasons respondent gives to justify the Seventh Circuit's decision fails under the weight of this Court's reasoning in *Taylor*. Therefore, his final reason to deny the petition fails as well.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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